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Employer Update: DOL Releases Families First Act Regulations

The Families First Coronavirus Response Act (“FFCRA”), went into effect on April 1, 2020, which included its paid sick leave and family leave provisions related to COVID-19. Later that day, the Department of Labor (“DOL”) issued a “temporary rule,” which includes the current version of the regulations governing the FFCRA’s paid leave entitlement, and employers obligations relating to them. This temporary rule has been submitted to the Office of the Federal Register (“OFR”) and is currently pending publication. The temporary rule released on April 1, 2020, may vary slightly from the final published document if minor technical or formatting changes are made during the OFR review process. While the temporary rule is lengthy and complex, we have summarized some key highlights as it currently stands for employers below:

General (Section 826.10)

- As a general rule, definitions in the Family Medical Leave Act (“FMLA”) apply to the Emergency and Medical Leave Expansion Act (“EFMLEA”) unless the EFMLEA states otherwise. Both the Emergency Paid Sick Leave Act (“EPSLA”) and EFMLEA adopt the FMLA’s definition of “son or daughter.”
- The definition of telework clarifies that telework is no less work than work performed at the site. As a result, employees who are teleworking for COVID-19 related reasons must always record, and be compensated for, all hours actually worked, including overtime, in accordance with the requirements of the FLSA.
- In the commentary to this Rule, the DOL urges flexibility in scheduling relating to telework. To that end, the DOL notes that the standard presumption that employees are working from when they first begin to when they stop working will not be applied to telework during the COVID-19 pandemic, and employers and employees may work together to break up the work day.

Paid Leave Entitlements (Section 860.20)

- The first (1) qualifying reason for EPSLA leave, quarantine or isolation orders, include a broad range of governmental orders, including orders that advise some, or all citizens to shelter-in-place, stay-at-home, quarantine, or otherwise restrict their mobility. An employee may take paid sick leave if being subject to one of these orders prevents him or her from working or teleworking and the employer has work for the employee. The order must be the “but for” reason the employee cannot work. Reason (1) does not apply to an employee who can no longer work because the employer closed due to a stay-at-home or similar order.
- The second (2) qualifying reason for EPSLA leave, advice to self-quarantine must be based on the health care provider’s belief that (a) the employee has COVID-19, (b) may have COVID-19, (c) or is particularly vulnerable to COVID-19. Self-quarantining must also prevent the employee from working or teleworking before the employee is eligible for FFCRA paid leave.
- The third (3) qualifying reason for EPSLA leave, where an employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis, leave is limited to the time the employee is unable to work because he or she is taking affirmative steps to obtain a medical diagnosis. For instance, for time spent making, waiting for, or attending an appointment for a test for COVID-19.
- The fourth (4) qualifying reason for EPSLA leave, the employee must have “genuine need” to care for an individual and a “personal relationship” with that individual. “Individual,” now defined, includes an “immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.” It does not include persons with whom the employee has no personal relationship.

- The fifth (5) qualifying reason for EPSLA leave, an employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. Generally, an employee does not need to take such leave if another suitable individual, such as a co-parent, co-guardian, or the usual childcare provider, is available to provide the care the employee's child needs. While not contained in the temporary rule, IRS guidance suggests that if the child is over 14, employers will need a statement providing the reason the child needs care during daylight hours in order to support the tax credit.
- A "full-time" employee is an employee who is normally scheduled to work at least 40 hours each workweek or who is scheduled to work, on average, at least 40 hours each workweek. Likewise, a "part-time" employee is an employee who is normally scheduled to work fewer than 40 hours each workweek or—if the employee lacks a normal weekly schedule—who is scheduled to work, on average, fewer than 40 hours each workweek. Averages should be computed over a 6-month period. The section also includes calculations for varying work schedules.
- For reason (5), leave to care for a child due to school closure or loss of a childcare provider, an employee is entitled to a combined 12-weeks of leave under both the regular FMLA and the EFMLEA.
- An employer may require that an employee take leave under the employer's policies that would be available to the employee to care for a child. Such as vacation, personal leave, or paid time off, concurrently with leave under the EFMLEA, and the employer must pay the employee a full day's pay for that day. This is a change from the Q&A guidance previously issued by the DOL.

Employee Eligibility for Leave under the EPSLA and EFMLEA (Section 826.30)

- This section defines which employees are “health care providers” or “emergency responders” whom employers may exclude from eligibility for the EPSLA and the EFMLEA’s leave requirements. However, an employer’s exercise of this option does not authorize an employer to prevent an employee who is a health care provider or emergency responder from taking earned or accrued leave in accordance with established employer policies.
- “Health care provider” and “emergency responder” are defined broadly. “Health care provider,” for instance, includes those who keep hospitals and similar facilities well supplied and operational, whether or not they are health care professionals. The section provides a non-exhaustive list of eligible job titles under both exemptions. Employers should evaluate this exemption on an employee-specific basis.

Employer Coverage under the EPSLA and EFMLEA (Section 826.40)

- The employer’s number of employees, for purposes of meeting or exceeding the 500-employee threshold, is determined at the time the employee would take leave.
- Joint or integrated employers must combine employees in determining the number of employees they employ for this purpose. The FLSA’s test for joint employer status applies in determining who is a joint employer for purposes of coverage. The FMLA’s test for integrated employer status applies in determining who is an integrated employer, under both the EPSLA and the EFMLEA.
- Under the “Small Business Exemption,” a small business (fewer than 50 employees) can deny an employee paid sick leave or expanded family and medical leave to care for the employee’s son or daughter whose school or place of care is closed, or child care provider is unavailable, for COVID-19 related reasons. This can be done if an authorized officer determines that: (1) granting the emergency leave would cause the small employer’s expenses and financial obligations to exceed

available business revenue and cause the small employer to cease operating at a minimal capacity; (2) the absence of the employee or employees requesting such leave would pose a substantial risk to the financial health or operational capacity of the small employer because of their specialized skills, knowledge of the business, or responsibilities; or (3) the small employer cannot find enough other workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services the employee or employees requesting leave provide, and these labor or services are needed for the small employer to operate at a minimal capacity.

- Under the “Small Business Exemption,” the small employer must document the facts and circumstances that justify such denial. The employer should not send the documentation to the DOL, but rather should retain such records for its own files.

Intermittent Leave (Section 826.50)

- One basic condition applies to all employees who seek to take their paid sick leave or expanded family and medical leave intermittently: they and their employer must agree.
- Under the **EPSLA**, an employee may take leave on an intermittent basis for any of the (6) reasons if he or she is (a) teleworking and (b) the employer agrees. If an employee is working at the place of employment, the employee may *only* take intermittent paid sick leave if the employer agrees and the employee is using the leave to care for a son or daughter who is home from school or daycare, *not* for any other qualifying reason. These limitations are intended to prevent the risk that the employee might spread COVID-19 to other employees when reporting to the employer’s worksite. Under the **EFMLEA**, the employee may take intermittent leave if agreed by the employer.

Leave to Care for a Child Due to School or Place of Care Closure or Child Care

Unavailability—Intersection between the EPSLA and the EFMLEA (Section 826.60)

- Both the EPSLA and the EFMLEA permit an employee to take paid leave when needed to care for his or her son or daughter whose school or place of care is closed, or childcare provider is unavailable, due to COVID-19 reasons.
- This section confirms that when an employee qualifies for leave under both EFMLEA and EPSLA, an employee may first use the two weeks of paid leave provided by the EPSLA. This use runs concurrent with the first two weeks of unpaid leave under the EFMLEA. Any remaining leave taken for this purpose is paid under the EFMLEA. A qualifying employee, however, is only entitled to a combined 12 weeks of leave under both Acts.

Leave to Care for a Child Due to School or Place of Care Closure or Child Care Unavailability – Intersection between the EFMLEA and the FMLA (Section 826.70)

- This section clarifies, where employees are eligible to take leave under the EFMLEA, employees are not necessarily entitled to regular FMLA leave. Employees must still meet the requirements under the FMLA to take FMLA leave for any reason other than articulated above.

Employer Notice (Section 826.80)

- Employers are required to post a notice of the law's requirements. The DOL has released a model notice in both English and Spanish.
- Employers are encouraged to distribute the notice via email or post it electronically because so many employees are working remotely.
- The FFCRA does not require employers to respond to employees who request or use EFMLEA leave with notices of

eligibility, rights and responsibilities, or written designations that leave use counts against employees' FMLA leave allowances.

Employee Notice of Need for Leave (Sections 826.90 & 826.100)

- An employer may require employees to follow reasonable notice procedures as soon as practicable after the first workday, or portion of a workday for which an employee receives paid sick leave in order to continue to receive such leave.
- An employer may not require the notice to include documentation beyond what is permitted in the regulations.
- Employers can require employees to comply with the usual procedures and requirements, absent unusual circumstances.
- An employee must provide his or her employer documentation in support of paid sick leave or expanded family and medical leave. Such documentation must include a signed statement containing the following information: (a) the employee's name; (b) the date(s) for which leave is requested; (c) the COVID-19 qualifying reason for leave; and (d) a statement representing that the employee is unable to work or telework because of the COVID-19 qualifying reason. There are additional documentation requirements depending on the type of leave being requested. Employers are advised to consult with counsel to determine the specific types of documentation permitted and required.
- The temporary rule makes clear that normal FMLA rules applicable to non-expanded FMLA are still in effect and must be followed.

Health Care Coverage & Multiemployer Plans (Section 826.110 & 826.120)

- An employee who takes EFMLEA leave or EPSLA leave is entitled to continued coverage under the employer's group

health plan on the same terms as if the employee did not take leave.

- Employees in a group health plan who take leave are responsible for paying the same portion of the health care premium that the employee paid prior to taking leave.
- An employer that is a signatory to a multiemployer collective bargaining agreement may, but is not required to, satisfy its obligations under the EFMLEA and the EPSLA by making contributions to a multiemployer fund, plan, or program. Any contributions made by the employer are required to be based on the amount of paid sick leave and expanded family and medical leave to which the employee would otherwise be entitled to based on the employee's work under the applicable agreement. The fund, plan, or other programs must allow employees to be paid for the leave they could otherwise take under the FFCRA.

Return to Work (Section 826.130)

- In most instances, employers must return employees to the same or an equivalent position when the employee returns from paid sick leave or expanded family and medical leave in the same manner that an employee would be returned to work after FMLA leave.
- If the employer can show that the employee would not otherwise have been employed at the time reinstatement is requested, the employer will be excused from the restoration requirement.
- In certain circumstances, the restoration requirement does not apply to employers with fewer than 25 employees.

Recordkeeping (Section 826.140)

- Employers are required to keep all records provided pursuant to FFCRA for four years.
- Employers are required to retain and support any claim for tax credits as required by the IRS. More information related to

claiming tax credits can be found [here](#).

Enforcement (Section 826.150)

- Employers are prohibited from discriminating, discharging, or disciplining an employee who exercises their rights under the FFCRA. The FFCRA utilizes the same enforcement procedures and provides the same remedies as the FMLA and the FLSA with one important exception: an employee may not bring a private action against an employer under the EFMLEA if the employer is not otherwise subject to the FMLA.

Effect of Other Laws, Employer Practices, and Collective Bargaining Agreements (Section 826.160)

- An employee's entitlement to leave under the FFCRA does not impact the employee's entitlement to any other right or benefit to which the employee is entitled under any other federal, state, or local law; under any collective bargaining agreement; or under any employer policy that existed prior to April 1, 2020.
- Employees do not have any right or entitlement to use FFCRA leave retroactively.

Sequencing of Leave (Section 826.160)

- An employee may choose to use paid sick leave prior to using any other type of paid leave to which he or she is entitled under any other federal, state, or local law; collective bargaining agreement; or employer policy that existed prior to April 1, 2020. This decision is at the employee's discretion. Employers cannot influence or coerce an employee to use another source of paid leave before taking paid sick leave.
- An employee may elect to use, or an employer may require that an employee use, leave the employee has available under the employer's policies to care for a child, such as vacation or personal leave or paid time off,

- If EFMLA is used concurrently with another source of paid leave, then the employer has to pay the employee the full amount to which the employee is entitled under the employer's preexisting paid leave policy for the period of leave taken, even if that amount is greater than \$200 per day or \$10,000 in the aggregate. Any tax credit, however, is still subject to the statutory cap.
- Employers are not required to pay out any unused FFCRA leave.
- The 80 hours cap for EPSLA leave is per employee. An employee cannot get an additional 80 hours for a subsequent qualifying event or by moving to a subsequent employer.

Frost Brown Todd will continue to monitor and update you on your FFCRA obligations. For more information or questions relating to this specific article, or on the FFCRA generally, please contact [Jeff Lindemann](#), [Catherine Burgett](#), [Steve Tolbert](#), or any attorney in Frost Brown Todd's [Labor & Employment Practice Group](#) or the [Private Equity](#) Industry Team.

To provide guidance and support to clients as this global public-health crisis unfolds, Frost Brown Todd has created a [Coronavirus Response Team](#). Our attorneys are on hand to answer your questions and provide guidance on how to proactively prepare for and manage any coronavirus-related threats to your business operations and workforce.

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